INSOFEX SDN BHD

v.

LABASAMA GROUP (M) SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-456-1993]
31 MARCH 1995

CIVIL PROCEDURE: *Consent order - Effect of - Whether court privy to negotiations prior to hearing*

CIVIL PROCEDURE: *Consent order - Finality of - Whether may be questioned - Agreement by parties that application for specific performance be struck off*

CIVIL PROCEDURE: *Damages - Assessment of damages - Whether proper for damages to be assessed - Rules of the High Court, O. 37*

By a sale and purchase agreement, the plaintiffs entered into an agreement with the defendant to purchase certain pieces of land ('the said property') for an agreed sum of RM1,709,072.50. The agreement was subject to the removal of a certain condition ('condition 2') appearing in the issue documents of title to the said property where it was stated that 'the said property shall not be capable of being transferred or charged until the buildings have been duly erected and completed in accordance with the buildings plans approved by the appropriate authority.'

Part payment in the sum of RM136,000 was made to the defendants and part of the balance was to be paid after the removal of condition 2 and the remaining part of the balance within one year from the date of the last payment.

The defendants however failed to remove condition 2 and the plaintiffs brought an action. The plaintiffs initially filed an application for specific performance of the agreement against the defendants under O. 81 of the Rules of the High Court 1980 ('RHC') but abandoned such prayer after the defendants reimbursed RM136,000 and focused their attention to the damages for breach of contract to be assessed by the senior assistant registrar ('SAR') under O. 37 of the RHC.

The issue for consideration was whether the payment of RM136,000 was to be considered as final payment and whether damages should still be assessed by the SAR.

Held:

[1] A judgment by consent or default is as effective as an estoppel between the parties as a judgment whereby the court exercises its mind on a contested case.

[1a] The parties had agreed that the application for specific performance be struck off by consent and that being the case the finality of such a consent judgment can never be questioned nor re-agitated by the parties in any subsequent proceedings.

[2] The courts are not privy to negotiations between parties prior to the hearing. What transpires outside the four walls of the courts are of no concern to the courts. The courts are only concerned that rules and procedures are adhered to.

[2a] The facts of the case disclosed a complete agreement between the parties. The defendants however had breached it when they had failed to remove condition 2. The minutes attached to the pleadings bears the all-encompassing recital that the damages for breach of contract be assessed by the SAR under O. 37 of the RHC.

Per curiam:

[1] In assessing damages, the SAR must not forget that the attendance of witnesses and the production of documents may be compelled by writ of subpoena and the provisions of O. 35 of the RHC shall apply with necessary adaptations. In assessment of damages, the SAR will usually proceed in chambers but if the need arises the proceedings may be conducted in open court. What is important at the end of the day is that the SAR shall certify the amount of damages.

[Order accordingly.]

Case(s) referred to:
Anglesley (Earl) v. Annesley [1741] 1 Bro Parl Cas 289 ***(refd)***
Chi Liung Holdings v. NTS Arumugam Pillai [1982] 2 MLJ 40 ***(foll)***
Hesz v. Sotheby [1960] 1 WLR 285 ***(refd)***
Kinch v. Walcot & Ors]1929] AC 483 ***(foll)***
Re South American and Mexican Co, ex p Bank of England [1895] 1 Ch 37 ***(foll)***
Von Hartzfeldt-Wildenburg v. Alexander [1912] 1 Ch 284 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 35, O. 37 r. 2, O. 81

For the plaintiffs - S Balarajah; M/s Balarajah & Co
For the defendants - Vijaya Gopal; M/s Vijaya Gopal & Assoc

Reported by Mariette Peters-Goh

JUDGMENT

Abdul Malik Ishak J:

By a sale and purchase agreement ("agreement") dated 8 February 1992, the defendants as beneficial proprietors agreed to sell all those pieces of lands comprised in ML Nos: 72-82 for Lot Nos: 2514-2524 and ML Nos: 223-232 for Lot Nos: 2665-2674 in the Mukim of Tebrau, District of Johor Bahru ("the said property") to the plaintiffs at an agreed sum of RM1,709,072.50. The plaintiffs paid part payment of the purchase price in the sum of RM136,000 to the defendants following closely the terms and conditions of the agreement. The plaintiffs also agreed to pay, under the agreement, RM629,228.90 on or before 31 January 1993 subject to the removal of condition 2 appearing in the issue documents of title to the said property where it was stated that "the said property shall not be capable of being transferred or charged until the buildings have been duly erected and completed in accordance with the building plans approved by the appropriate authority" (see para. 3 of encl. 10). Under the agreement, the balance sum of RM821,843.70 was payable within one year from the date of the last payment.

The plaintiffs, after having paid the initial part payment of RM136,000, were at all material times ready, able and willing to complete the agreement and, towards this end, they have lodged a caveat on the said property. Unfortunately, despite several requests and demands the defendants have failed to remove condition 2 from the issue documents of title and, consequently, the plaintiffs were prevented from completing the agreement. In short, the inaction by the defendants to remove condition 2 from the issue documents of title have brought an end to the agreement. This prompted the plaintiffs to file an application for specific performance of the agreement against the defendants under O. 81 of the Rules of the High Court 1980 ("RHC") by way of summons-in-chambers. Though the minutes attached to the summons listed six (6) prayers, the plaintiffs decided to abandon the prayer for specific performance of the agreement after the defendants re-imbursed RM136,000 and focused their attention to the damages for breach of contract to be assessed by the senior assistant registrar under O. 37 of the RHC.

What transpired in chambers can best be seen in the chronological events that are set out below.

(1) on 12 December 1994, Encik S. Balarajah counsel for the plaintiffs appeared and mentioned on behalf of the defendants' counsel. It seemed that the defendants had just engaged counsel and that counsel had served a notice of change of solicitors to the plaintiffs' counsel; with such short notice the defendants' counsel requested for an adjournment to enable them to file their affidavit-in-reply. The plaintiffs' counsel agreed to the adjournment and undertook to inform the defendants' counsel of the next date of hearing and the plaintiffs' counsel also agreed that costs at RM250 be paid to the plaintiffs by the defendants before the next date of hearing.

(2) on 20 February 1995, Encik S. Balarajah again appeared for the plaintiffs whilst Puan Vijaya Gopal appeared for the defendants. Counsel for the plaintiffs informed the court that they just received a cheque in the sum of RM136,000 from the defendants' counsel and they needed time to see whether the cheque was good. The court then proceeded to give another date for the hearing of encl. 11 and at the same time noted that there was a possibility of a settlement and such possibility of a likely settlement was confirmed by the defendants' counsel.

(3) at the next date of hearing and this was on 28 March 1995, the same solicitors appeared for the respective parties. The plaintiffs' counsel informed the court that the defendants' cheque of RM136,000 was cleared and the plaintiffs now intended to abandon their prayer for specific performance of the agreement and, *in lieu* thereof, the plaintiffs sought for damages to be assessed before the senior assistant registrar under O. 37 of the RHC. The defendants' counsel, obviously taken by surprise, objected and submitted that her instructions were that the sum of RM136,000 was payment by way of final settlement without damages to be assessed. She further submitted that if the plaintiffs' counsel was bent on proceeding with the damages, then she had no choice but to discharge herself and undertook to file her withdrawal papers in due course. She, however, agreed that, in the circumstances, the application for specific performance should be struck off. Counsel for the plaintiffs then told the court that there was no agreement between the parties that the payment of RM136,000 was to be considered as final payment and he was adamant that damages should be assessed by the senior assistant registrar.

It is with these background facts that, firstly, the application for specific performance of the agreement under O. 81 of the RHC was struck off, and secondly, damages to be assessed by the senior assistant registrar under O. 37 of the RHC was ordered.

What is the effect of a consent judgment in so far as the application for specific performance is concerned?

Kinch v. Walcot and Others [1929] AC 483 is authority for the proposition that an order by consent is binding unless and until it has been set aside in proceedings constituted for that purpose. There the plaintiff in an action based upon charges which he has withdrawn by a consent order in a previous action between the parties is estopped by the order, and cannot effectively plead in reply that his consent was induced by fraudulent concealment.

In *Re South American and Mexican Co., Ex parte Bank of England* [1895] 1 Ch. 37; 11 TLR 21, the headnote reads:

> A judgment by consent, or default, is as effective as an estoppel between the parties as a judgment whereby the court exercises its mind on a contested case.
>
> An action was brought against a company to recover an instalment of a debt alleged to be due under an agreement, the existence of which was denied by the company:
>
> Held (affirming the decision of Vaughan Williams J), that judgment by consent for the plaintiffs precluded the liquidator in the winding-up of the company from denying the existence of the agreement on a proof being sent in for the total amount due under the agreement.

Vaughan Williams J, at the beginning of his judgment said (at p. 44):

> I am of opinion that my decision must be in favour of the Bank of England and against the official receiver. My only reason for hesitating to come to such a decision has been that I could see so little ground for doubt in the matter that I was afraid I must be overlooking something; but I must now give judgment according to my own view of the matter.

After dealing with some of the facts he continued (at p. 45):

> Under these circumstances I have only to consider, with reference to the second question, Mr. Moulton's suggestion, that a judgment by consent, upon which the court has not exercised its mind, does not and cannot raise an estoppel *inter partes*. I can only say this is the first time I have ever heard such a proposition suggested. It has always been the law that a

> judgment by consent or by default raises an estoppel just in the same way as a judgment after the court has exercised a judicial discretion in the matter. The basis of the estoppel is that, when parties have once litigated a matter, it is in the interest of the state that litigation should come to an end; and if they agree upon a result, or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been sought out to the bitter end.

These authorities reflect the finality of judgments both after a trial and where such judgments were obtained by consent. Applying these principles to the present case, the parties agreed that the application for specific performance be struck off by consent and that being the case the finality of such consent judgment can never be questioned nor re-agitated by the parties in any subsequent proceedings.

The return of RM136,000 to the plaintiffs must surely be the prime consideration for the withdrawal of the specific performance of the agreement by the plaintiffs and for this sudden change of heart no one can be faulted.

To digress, the plaintiffs in an action under O. 81 of the RHC seeking specific performance must not only plead the agreement but also state whether the consideration has been provided and, finally, must state whether time for performance was due. These are ingredients that would give rise to an enforceable agreement under the law. Thus, in *Chi Liung Holdings v. NTS Arumugam Pillai* [1982] 2 MLJ 40, it was held that only in cases where there is absolutely no defence will the court allow specific performance under O. 81 of the RHC. Incidentally, *Anglesley (Earl) v. Annesley* [1741] 1 Bro. Parl Cas. 289; 1 ER 573 HL was considered in *Chi Liung Holdings* and in that case it was stated that:

> If an agreement is part performed by one of the parties, it is too late for the other to complain of fraud, surprise, etc., or attempt to set the agreement aside on that account; for a court of equity will decree specific performance of the remaining part of it.

It would appear therefore that so long as there is hardly any defence available to the defendant, a plaintiff is entitled to obtain specific performance of an agreement. But in sharp contrast would be the case of *Von Hartzfeldt-Wildenburg v. Alexander* [1912] 1 Ch. 284 where the purchaser stipulated that her acceptance was subject to, *inter alia*, a condition that her solicitors should "approve the title to and covenants contained in the lease, the title from the freeholder and the form of contract", and it was held that on the construction of the documents, those documents were held not to be a complete contract susceptible of being enforced by way of specific performance.

Here, the contract between the parties as supported by the agreement was complete. The plaintiffs have paid part of the sum which they bargained to pay and were willing to tie themselves further by proceeding to the next stage subject to the removal of condition 2 that appeared in the issue documents of title. The defendants did not do anything to remove the impediment in condition 2 and this made it simply impossible for the plaintiffs to proceed with the agreement unless the plaintiffs obtained specific performance under O. 81 of the RHC. The defendants must have been advised to reimburse RM136,000 to the plaintiffs knowing fully well that the agreement was a complete agreement and the defendants had breached it when they failed to remove the thorn in condition 2.

In assessing damages, the senior assistant registrar must not forget that the attendance of witnesses and the production of documents may be compelled by writ of subpoena and the provisons of O. 35 of the RHC shall apply with the necessary adaptations. In Britain, in the Queens Bench Division, the proceedings in the assessment of damages are held in public (*Hesz v. Sotheby* [1960] 1 WLR 285), whereas in the Chancery Division, the damages are assessed in chambers. Here in Malaysia, in an assessment for damages, the senior assistant registrar will usually proceed in chambers but if the need arises the proceedings may be conducted in open court and when this happens the provisions of O. 35 of the RHC shall with the necessary adaptations apply. What is important is that, at the end of the day, the senior assistant registrar shall certify the amount of the damages (see O. 37 r. 2 of the RHC).

I must state at once that the courts are not privy to the negotiations between the parties prior to the hearing. What transpired outside the four walls of the courts are of no concern to the courts. The courts are only concerned that the rules and procedures are adhered to and, towards this end, the minutes attached to the summons in encl. 11 at para. 4 bears the all encompassing recital that the damages for breach of contract be assessed by the senior assistant registrar under O. 37 of the RHC. Taken from this angle, the request by the plaintiffs' counsel was appropriate and an order to that effect was accordingly made.